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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

RON WIRKKALA,

Appellant,

v.

**WASHINGTON STATE
DEPARTMENT OF ECOLOGY,**

Respondent.

**PCHB NOS. 94-171, 94-172
94-173 & 94-174**

**ORDER GRANTING
SUMMARY JUDGMENT
AND DISMISSAL**

**STEVEN T. and HEATHER H.
RAINEY.**

Appellants,

v.

**WASHINGTON STATE
DEPARTMENT OF ECOLOGY,**

Respondent.

Appellants Steven and Heather Ramey, and Ron Wirkkala, respectively, filed motions for summary judgment with the Pollution Control Hearings Board ("Board") in these consolidated appeals, on August 31 and September 2, 1994. Respondent, the Department of Ecology ("Ecology") filed a written response in opposition to the motions, on September 30, 1994. Ecology, in effect requested summary judgment be granted to it, in its response. Appellants filed written replies on October 7.

**ORDER GRANTING SUMMARY
JUDGMENT AND DISMISSAL
PCHB NOS. 94-171-174**

1 The Board was comprised of the Hon William A. Harrison, Administrative Appeals
2 Judge, presiding, Robert V. Jensen, chairman, and Richard C. Kelley and James A. Tupper, Jr.,
3 members
4

5 The Raineyes were represented by attorney Charles B. Roe, Jr., of Perkins Cote. Mr.
6 Wirkkala was represented by attorney, Wick Dufford. Ecology was represented by Assistant
7 Attorney General, Mark Jobson.
8

9 The oral argument was recorded by Kim Otis, court reporter affiliated with Gene Barker
10 and Associates, Inc. of Olympia.

11 The Board considered the following rulings and pleadings:

- 12 1) Order Denying Stay in PCHB No. 94-87,
- 13 2) Stipulation and Agreed Order of Dismissal of PCHB No. 94-87,
- 14 3) Appellants' Raineyes' Motion for Summary Judgment,
- 15 4) Appellants' Raineyes' Brief in Support of Motion for Summary Judgment, including
16 appendices A-K,
- 17 5) Appellant Wirkkala's Motion for Summary Judgment,
- 18 6) Appellant Wirkkala's Memorandum in Support of Motion for Summary Judgment,
- 19 7) Respondent Ecology's Memorandum in Opposition to Appellants' Motion for
20 Summary Judgment,
- 21 8) Appellants' (Raineyes') Reply to Brief, and
- 22 9) Appellant Wirkkala's Reply Brief.
- 23

24 Having considered the legal arguments, we rule as follows:
25

26 **ORDER GRANTING SUMMARY**
27 **JUDGMENT AND DISMISSAL**
PCHB NOS. 94-171-174

1 Having considered the legal arguments, we rule as follows

2
3 I

4 The motions for summary judgment raise two issues first, whether Mr the plan of Mr
5 Wirkkala's father and Mr Wirkkala, to cease irrigating 30 acres for 10 to 14 years, and resume
6 irrigation with new water conveyance lines constitutes a "future determined development,"
7 under RCW 90 14 140(2)(c), and therefore an exception to the relinquishment provisions of
8 RCW 90 14, and second, whether Ecology lawfully denied Mr Wirkkala's application for a
9 temporary transfer of the surface water right, which is the subject of the relinquishment action?
10

11 II

12 Summary judgment is appropriate if there is no genuine issue as to any material fact and
13 the moving party is entitled to a judgment as a matter of law Ecology v. Yakima Reservation
14 Irrig. Dist., 121 Wn 2d 257, 273, ___ P 2d ___ (1993)
15

16 III

17 There are no disputed issues of fact, therefore, the issue is which party should prevail as a
18 matter of law This requires the Board to interpret the governing statutory provisions
19

20 IV

21 In 1947, the Supervisor of Hydraulics, a predecessor agency to Ecology, issued a
22 Certificate of Water Right to Herbert Wirkkala, the father of Ron Wirkkala The right was for a
23 diversion of 20 cubic feet per second instantaneous flow from Lincoln Creek, a tributary of the
24
25

1 Chelalis River to provide water for irrigation and stock on a 30 acre parcel of land. The date of
2 priority of the right was 1944
3

4 V

5 The state, to protect the public interest, put an administrative hold on the issuance of any
6 further water rights from Lincoln Creek in 1948
7

8 VI

9 RCW 90 03 005 clearly expresses the public interest in water resource decision-making.
10 as follows

11 It is the policy of the state to promote the use of public waters in a fashion which proves
12 for obtaining maximum net benefits arising from both diversionary uses of the state's
13 public waters and the retention of waters within streams and lakes in sufficient quantity
14 and quality to protect instream and natural values and rights. Consistent with this policy,
15 the state supports economically feasible and environmentally sound development of
16 physical facilities through the concerted efforts of the state with the United States, public
17 corporations, Indian tribes, or other public or private entities. Further, based on the tenet
18 of water law which precludes wasteful practices in the exercise of rights to the use of
19 waters, the department of ecology shall reduce these practices to the maximum extent
20 practicable, taking into account sound principles of water management, the benefits and
21 costs of improved water use efficiency, and the most effective use of public and private
22 funds, and, when appropriate, to work to that end in concert with the agencies of the
23 United States and other public and private entities
24

25 VII

26 The Legislature, in the same year, enacted the Water Rights Registration Act, for the
27 purpose of providing adequate records for efficient administration of the state's waters, and to
cause a return to the state of any water rights which are no longer exercised by putting said
waters to beneficial use" RCW 90 14 010

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VIII

To this end, the new statute provides for the relinquishment of water rights, and their reversion to the state for non use, during any consecutive five year period RCW 90 14 130.

180 The statute provides that the relinquishment and reversion will occur unless the water right holder can demonstrate either one of five bases for "sufficient cause" for the non use, or that the holder falls within one of five stated statutory exceptions RCW 90 14 140

IX

The exception relied upon by appellants is applicable where the "right is claimed for a determined future development to take place either within fifteen years of July 1, 1967, or the most recent beneficial use of the water right, whichever date is later " RCW 90 14 140(2)(c)

X

The Legislature enacted the Water Resources Act in 1971 The State Supreme Court concluded that this enactment was as vigorous as the State Environmental Policy Act in its policy declaration Stempel v. Dept. of Water Resources, 82 Wn 2d 109, 119, 508 P 2d 166 (1973) Specifically the Court declared that "[t]he state water resource policy finds that the public health preservation of natural resources and aesthetic values are deserving of promotion, in addition to the state's economic well-being RCW 90 54 010" Id.

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XI

The Legislature confirmed, in RCW 90 54 020(1), that beneficial uses include environmental protection, as follows

[u]tilization and management of the waters of the state shall be guided by the following general declaration of fundamentals

(1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial

XII

The Water Resources Act directed Ecology to develop a comprehensive water resources program, in order to "provide a process for making decisions on future water resource allocation and use," and reduce or resolve conflicts among water users and interests" RCW 90 54 010(1)(b), 040(1)

XIII

The Legislature affirmed the authority of Ecology to protect the public interest through regulations that "(1) Reserve and set aside waters for beneficial utilization in the future, and (2) When sufficient information and data are lacking to allow for the making of sound decisions, withdraw various waters of the state from additional appropriations until such data and information are available" RCW 90 54 050

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XIV

Ecology, under that authority, promulgated WAC 173-500, as the backbone of its comprehensive state water program to "provide a process for making decisions on future water resource allocations and uses" WAC 173-500-010(2) That regulation divided the state into 62 areas known as water resource inventory areas ("WRIA's") The Chelalis River Basin comprises areas 22 and 23 WAC 173-500-040(22)-(23), WAC 173-522 Both regulations were adopted in 1976 The latter (WAC 173-522), limited future allocation of water by establishing base flows on many streams and creeks, and recognizing the closure of and closing additional streams, creeks and tributaries to future consumptive appropriations WAC 173-522-030 and -050

XV

The appellants did not raise a facial challenge to any of these regulations They did, however, challenge the application of WAC 173-522-050 to the application of Mr Wirkkala for a temporary transfer of his water right to the Rameys We need not address this challenge, however, because our resolution of the relinquishment issue disposes of the case

XVI

From 1944 through 1982 Herbert Wirkkala continuously exercised his water right, during the irrigation season, by diverting waters from Lincoln Creek for the purpose of irrigating 30 acres of land to grow primarily, hay and peas and for pasture

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XVII

During 1981 and 1982, Herbert Wirkkala discussed with his son Ron, the future modification of the farm operations. These conversations were occasioned in part by the desire of Herbert Wirkkala to slow down his operation of the farm. In the summer of 1982, they decided to rent out the farm, without the right of irrigation, to others, until Ron Wirkkala retired so that he could have a chance to work on the farm full-time. It was their intent that Ron Wirkkala would have retired and started working on the farm full time by 1995 or 1996.

XVIII

The Wirkkalas did not prepare any contemporaneous documentation of the details of the resumption of irrigation. Herbert Wirkkala died in 1985. They discussed this plan with Ron Wirkkala's two sons, however, neither of them testified about the plan. A neighbor and friend confirmed that the discontinuance of irrigation of the land was due to Herbert's desire to slow down. Nevertheless, Ron Wirkkala now represents that he and his father intended that the water would be diverted from the same point as before, that the land irrigated would be the identical 30 acres, and that the crops would be potatoes and peas.

XIX

The principal new element of the plan, was to construct a new water delivery system, consisting of a 2587 foot long underground mainline. Lateral lines would run perpendicularly out from this line in both directions every 200 feet.

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Since 1982, the original pumps for the irrigation of the 30 acres remained in place, until early in 1994, on the premise that they would be used in the future irrigation by Ron Wirkkala. They were run each year, as a maintenance measure, to insure their operability. Early this year the pumps were removed and serviced by Rogers machinery Co. of Centralia, in anticipation of irrigation by Mr. Wirkkala.

XXI

During the past several years, Ron Wirkkala has spent time on weekends, and now that he is retired, more often, improving the farm so that he can shift his residence there. In this regard, he has repaired farm buildings, the residence, the fence and gates. These projects have been delayed by Mr. Wirkkala's ill health. In 1990, he was diagnosed with cancer. He underwent radiation and chemotherapy treatment. He is now in remission, and looking forward to returning to the farm in 1995.

XXII

Steven and Heather Rainey own land on Lincoln Creek, about 4 of a mile upstream from Mr. Wirkkala. They had been irrigating approximately 45 acres of land from Lincoln Creek, without any evidence of an existing water right, earlier this year. Ecology, on May 26, 1994, issued a cease and desist order against this diversion. The Rainey's filed an appeal with the Board on May 26, 1994. The Board approved a stipulated stay until June 25, 1994, on May 31, 1994.

1 After hearing argument of June 24, 1994 the Board issued a stay until July 7, 1994. On July 8,
2 the Board denied any further extension of the stay
3

4 XXIII

5 Ecology received an application from the Rainey's and Mr. Wirkkala on June 20, 1994, to
6 temporarily change the point of diversion of Mr. Wirkkala's water right upstream to the Rainey's
7 property for the 1994 irrigation season. This application was signed by both Ron Wirkkala and
8 Heather Rainey
9

10 XXIV

11 Ecology, by letter dated July 14, 1994, denied the proposed temporary change of point of
12 diversion. On July 22, 1994, Ecology issued a Report, Findings of Fact, Determination and
13 Order that Mr. Wirkkala show cause to the Board why his water right should not be relinquished
14

15 XXV

16 Both the Rainey's and Mr. Wirkkala appealed these decisions to the Board on August 9,
17 1994.

18 XXVI

19 The Rainey's and Mr. Wirkkala applied to Ecology for an identical change of point of
20 diversion for the 1995 irrigation season, on August 26, 1994. Ecology has not made any
21 determination on this application
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XXVII

The Board has been conservative in its interpretation of the "determined future development" exception to the relinquishment of water rights under RCW 90.14. In Turner v. Ecology, PCHB No. 81-177 (1982), the appellant testified to conflicting plans "to raise seed alfalfa, develop one acre single family residences and/or use the water supply in time of drought or low flow period to continue irrigation." Turner at 6. The Board interpreted "determine" to mean "to come to an end," and "to fix conclusively or authoritatively." Id. The Board, applying these definitions to the case, concluded that the intended plans were "inconsistent with each other and subject to change." Id.

XXVIII

More recently, in Cocking Farms v. Ecology, PCHB No. 93-251 (1994), the Board concluded that once it has been shown that the water user has failed to use the water for five consecutive years, the burden of proof shifts to such user to establish that it qualifies for the exception for a "determined future development." Cocking Farms at 5. We held that the user must demonstrate through objective evidence that it has a commitment to invest in the future irrigation of the land. Id. Today, under the facts of this case, we add a third element, namely, that the period which the user intends to utilize in preparation of the "determined future development," be commensurate with the time necessary to implement the plan. We infer from the evidence that it would take no more than one year for Mr. Wirkkala to place in operation his new water distribution system.

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XXIX

Mr. Wirkkala has not met that test. For at least 10 years, his father and simply did not irrigate or invest any capital in the future irrigation of the land. The only purpose of this hiatus in use was to await Mr. Wirkkala's retirement. The proposed investment in the new distribution system has yet to occur, 12 years after the last irrigation of the land.

XXX

We further conclude that Mr. Wirkkala has failed to provide the necessary objective evidence of commitment to the proposed "determined future development." The evidence that he has spent time fixing up the place, does not provide the specific evidence necessary to establish commitment to the development. The fact that he has repaired the pump machinery, shows that he is interested in maintaining it for some future use. However that act alone is not helpful in defining in any meaningful way the specifics of that use, as to extent, time and manner of use. Absent any evidence of investment in the new distribution system, we are left with the conclusion that Mr. Wirkkala could at any time change his plan.

XXXI

Indeed, the present plan to transfer his water right temporarily to the Rainey's simply illustrates the amorphous nature of his plan, and accentuates how unnecessary the fifteen year period allowed by statute is to his accomplishment of that plan.

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XXXII

We therefore conclude, that Mr Wirkkala's plan is not a "determined future development," as those terms are used in RCW 90 14 140(2)(c) The plan does not satisfy the statute's requirement for a conclusively fixed future use The "determined future development" exception must be interpreted in a way that is consistent with the underlying purposes of RCW 90 14 which are to ensure adequate records and to return unexercised water rights to the state Mr Wirkkala's plan fails to satisfy either of these purposes Therefore, his water right should be relinquished

XXXIII

Based on the foregoing, the Board issues this

ORDER

Summary judgment is granted to Ecology, and PCHB Nos 94-171-174 are dismissed

DONE this 2nd day of November, 1994.

POLLUTION CONTROL HEARINGS BOARD


ROBERT V. JENSEN, Presiding Officer


RICHARD C. KELLEY, Member

(See Dissent)
JAMES A. TUPPER, JR. Member

P94-171F

**ORDER GRANTING SUMMARY
JUDGMENT AND DISMISSAL
PCHB NOS. 94-171-174**

DISSENT

1 Harrison, J —The majority today imbues a statute with requirements which are not there,
2 and deprives citizens of rights which they should not lose Accordingly, this dissent is
3 necessary
4

I

5
6 ISSUES The two issues, as agreed by the parties, are

7 1 As to the appeal of DE 94WR-S284, whether the [Wirkkala] water right
8 embodied in Certificate No 2787 is a right which, although not beneficially used for more
9 than five consecutive years, is not relinquished because the right is "claimed for a
10 determined future development to take place either within fifteen years of July 1, 1967, or
11 the most recent beneficial use of the water right, whichever date is later" ?
12 (quoting from RCW 90 14 140(2))
13

14 2 As to the appeal of the denial of the [Wirkkala and Rainey] application
15 for temporary/seasonal change, (a) the issue described [above], and (b)
16 whether the requested change may be made without detriment to existing rights under
17 RCW 90 03 390? Agreed Pre-Hearing Order entered August 24, 1994 These will now
18 be taken up , in turn
19

ISSUE ONE

20
21 Whether the water right is not relinquished?

II

22
23 NO RELINQUISHMENT Any discussion of the forfeiture or relinquishment of
24 a water right must begin with recognition that property owners, such as Wirkkala, have a
25 vested interest in their water rights Sheep Mountain v Ecology, 45 Wn App 427, 430,
26

726 P 2d 55 (1986), citing Department of Ecology v. Adsit, 103 Wn 2d 698, 705, 694
P 2d 1065 (1985) and Department of Ecology v. Acquavella, 100 Wn 2d 651, 655, 674
P 2d 160 (1983). A forfeiture is the involuntary relinquishment of a property right due to
the failure to comply with a statutorily imposed condition. *Law of Water Rights and
Resources*, A. Dan Tarlock (1994), p. 5-98.8, citing United States v. Locke, 471 U.S. 84
(1985) and Texaco, Inc. v. Short, 454 U.S. 516 (1982). The statutorily imposed
condition which is at issue provides

RCW 90.14.140 (2)

(2) Notwithstanding any other provisions of RCW
90.14.130 through 90.14.180, there shall be no
relinquishment of any water right.

*(a) If such a right is claimed for power development
purposes under chapter 90.16 RCW and annual license fees
are paid in accordance with chapter 90.16 RCW, or*

*(b) If such right is used for a standby or reserve water
supply to be used in time of drought or other low flow
period so long as withdrawal or diversion facilities are
maintained in good operating condition for the use of such
reserve or standby water supply, or*

*(c) If such right is claimed for a determined future
development to take place either within fifteen years of July
1, 1967, or the most recent beneficial use of the water
right, whichever date is later, or*

*(d) If such right is claimed for municipal water supply
purposes under chapter 90.03 RCW, or*

*(e) If such waters are not subject to appropriation under
the applicable provisions of RCW 90.40.030 as now or
hereafter amended*

1 The water right of a property owner is not relinquished where it falls within the foregoing
2 statute. The reference in that statute to RCW 90 14 130 through 90 14 180 renders the
3 "Five Year" non-use rule irrelevant to those enumerated rights. Mr. Wirkkala's vested
4 water right, on these facts, falls within that statute. There has been no failure to comply
5 with a statutorily imposed condition, and no relinquishment.

6 III

7 THE MEANING OF RCW 90 14 140(2)(c). The statute at issue, RCW
8 90 14 140(2)(c), provides, in pertinent part

9 *(2) Notwithstanding any other provisions of*
10 *RCW 90 14 130 through 90 14 180, there shall be no*
11 *relinquishment of any water right.*

12 *(c) If such right is claimed for a determined future*
13 *development to take place within fifteen years of the*
14 *most recent beneficial use of the water right.*

15 These words in the statute are not specially defined. Words or phrases in a statute are
16 given their ordinary or plain meaning where the Legislature fails to define them. *See e.g.,*
17 State v. Friend, 59 Wn. App. 365, 376 (1990). In ascertaining the meaning of an
18 undefined word or phrase, resort is often made to a dictionary for guidance. *See e.g.,*
19 Discipline of Blauvelt, 115 Wn. 2d 735, 741 (1990).

20 IV

21 The word "claimed" in the statute derives from the word "claim." This is defined
22 by the dictionary as "to demand recognition of (as a title, distinction, possession or
23 power) esp. as a right." *Webster's Third New International Dictionary*, unabridged,
24 1971.
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V

1 The word "determined" in the statute is defined by the dictionary as "to fix
2 conclusively or authoritatively " *Webster's, supra*, and Turner v. Ecology, PCHB No
3 81-177 (1982) In Turner, the "Appellant testified about his plans to raise seed alfalfa,
4 develop one acre single family residences, and/or use the water supply in time of drought
5 or low flow period to continue irrigation " Turner at p 6 These conflicting plans were
6 held to be not fixed conclusively or authoritatively, and therefore not "determined"
7 Nothing in Turner would deny that plans which are fixed conclusively or authoritatively
8 are "determined", as that word is used in the statute
9

10
11 VI

12 The word "future" in the statute is defined by the dictionary as "that is to be, still
13 to come " *Webster's, supra*

14 VII

15 The word "development" in the statute is defined by the dictionary as "a developed
16 tract of land, esp a subdivision having necessary utilities (as water, gas, electricity,
17 roads) " *Webster's, supra* In the water rights context, the word "development" means a
18 completed appropriation of water on a tract of land for any beneficial use
19

20 VIII

21 The meaning of RCW 90 14 140(2)(c) is that one must demand recognition
22 ("claim") that a water right is held for a conclusively fixed ("determined") still to come
23 ("future") water appropriation on a tract of land ("development") The future
24 development must "take place" within a time limit, namely, "within fifteen years of the
25 most recent beneficial use of the water right " It is noteworthy, however, that the word
26

1 "future" modifies the word "development" without restricting when the development may
2 "take place" within the fifteen years allotted. In the present, the "future development"
3 need only be "determined."

4 IX

5 THE UNDISPUTED FACTS This matter comes forward on motions for
6 summary judgment. There are no material facts in dispute. There has been no issue of
7 credibility raised. On this footing, the undisputed, material facts can be summarized as
8 follows

9 1 Under priority date of 1944, the State granted to Mr. Herbert Wirkkala,
10 a right to appropriate the waters of Lincoln Creek for use in the irrigation of 30 acres
11 owned by Mr. Wirkkala in western Lewis County. (The "Wirkkala place")

12 2 From 1944 through 1982, the water right was exercised continuously to
13 irrigate the acreage of the Wirkkala place

14 3 During 1981 and 1982, Mr. Herbert Wirkkala, and his only child, Mr.
15 Ron Wirkkala, discussed modification of the farm plan. By 1982, Ron Wirkkala was 47
16 years old and a joint operator of the place with his father. However, Ron also held
17 employment off the farm. By 1982, Herbert Wirkkala desired to cut back his work load
18 on the farm due to advancing years. In this light, Herbert and Ron Wirkkala agreed that
19 for a discrete period of time, *i.e.*, until Ron Wirkkala retired and had a chance to work on
20 the farm full time, they would rent out the 30-acre parcel to others for a limited period of
21 time without conducting any irrigation thereon through exercise of the appropriative right.
22 That limited period of time would end with Ron Wirkkala's retirement from his off-farm
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employment in 1992. At that time Ron Wirkkala would return to live at the farm full time,
and

a. Water would be pumped from Lincoln Creek at the point of diversion that was used from 1944 through 1982. The pump would be a 3" rotary pump (or a pump similar thereto).

b. The land to be irrigated would be the 30 acres irrigated from 1944 through 1982.

c. The development would use a completely new and different water conveyance, delivery and application system consisting of an underground mainline 2,587 feet in length running in an east to west direction across the center of the 30 acre parcel. The mainline would have headers every two hundred feet. The headers would be connected to lateral water supply lines which would be laid in both north and south directions to the north and south boundaries of the 30 acre parcel.

d. The crops planned to be irrigated were various annual crops centering on potatoes and peas (crops with a long history of successful, profitable growth in the western Lewis County area, including the Lincoln Creek valley).

4. These plans were discussed with and well known to Ron Wirkkala's two sons who were 18 and 20 years old in 1982, as well as several close family friends who often visited the farm and helped out with farming activities from time to time.

5. Herbert Wirkkala passed away in 1985.

6. Ron Wirkkala, approaching retirement in 1990, was diagnosed with cancer. During the early 1990's that serious health problem required extensive chemotherapy and radiation treatment. Despite this, the pumps utilized in 1982 to

1 withdraw waters for irrigation of the 30 acres have remained in place on the basis that they
2 would be used on the planned future development Further, the pumps were actually run
3 and water was pumped each year as a general maintenance activity to insure that they
4 remained operable

5 7 Ron Wirkkala retired from his off-farm employment in 1992

6 8 Earlier this year, 1994, Ron Wirkkala, had the pumps removed and
7 serviced by Rogers Machinery Co of Centralia in anticipation of irrigating his 30 acre
8 parcel

9 9 In recent years, Ron Wirkkala began to fix up the Wirkkala place so that
10 he could change his place of residence to the Wirkkala place and begin active farming
11 thereon in 1995 In this regard, over the past several years he has been spending
12 considerable time (on the weekends when he was still working and more often now that he
13 is retired) improving the place by improving the farm buildings, the old home place house,
14 the fences and gates and by the aforementioned servicing of the pumps Thus, he has been
15 putting the place back in shape, consistent with the 1982 plan, after a decade of renting
16 the place as an absentee landlord
17
18

19 10 These projects have not gone as quickly as he would have liked due to
20 the serious health problems that he had through the early 1990's and the slow recovery of
21 his strength after regaining his health His doctors have advised him that he is now in a
22 remission stage He now feels vigorous and is looking forward to returning to the
23 Wirkkala place in 1995
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APPLYING RCW 90 14 140(2)(C) TO THE UNDISPUTED FACTS

RESULTS IN NO RELINQUISHMENT Ron Wirkkala, having been asked by Ecology to show cause here why his water right should not be relinquished, has demanded recognition that his water right is held for a conclusively fixed, still to come, water appropriation on the Wirkkala place. It is now twelve years from the most recent beneficial use of the water right. The development is scheduled to take place within the fifteen years allotted by the statute. Accordingly, the Wirkkala right "is claimed for a determined future development to take place within fifteen years of the most recent beneficial use of the water right", is in compliance with RCW 90 14 140(2)(c), and that right is not relinquished.

XI

STATUTORY POLICY The meaning given to a statute must give effect to the statute's purpose. *See, e.g., Department of Social and Health Services v. Handy*, 62 Wn. App. 105, 110-111 (1991). Even though a statutory declaration of policy has no operative force by itself, it is useful in determining how the legislative body intended the entire statute to operate. *Food Services of America v. Royal Heights*, 123 Wn.2d 779, 788 (1994). The purpose of the statute on relinquishment, wherein RCW 90 14 140(2)(c) is found, is set forth as follows at RCW 90 14 010:

The future growth and development of the state is dependent upon effective management and efficient use of the state's water resources. The purpose of this chapter is to provide adequate records for efficient administration of the state's waters, and to cause a return to the state of any water rights which are no longer exercised by putting said waters to beneficial use (emphasis added).

XII

Under the foregoing policy, the future growth and development of the state is tied to relinquishment of water rights which are no longer exercised. It is the irony of this case that Mr. Wirkkala wants nothing more than to put the water represented by his right to a beneficial use. The fifteen year rule of RCW 90 14 140(2)(c) is consistent with the overall statutory policy favoring beneficial use. That fifteen year rule does not prevent beneficial use. It applies only in cases where there is a fixed plan for beneficial use, likely to be realized within a time the Legislature has found reasonable.

XIII

The non-relinquishment feature of RCW 90 14 140(2)(c) is also consistent with other statutory policy in addition to RCW 90 14 010 favoring beneficial use. It has been accurately observed that the loss of a water right may destroy the value of the appurtenant land. *Law of Water Rights and Resources, supra*, p. 5-98.9. The economic loss suffered when farmlands must relinquish their valuable irrigation rights will logically compel the land owners to seek other means of obtaining the highest return. Among these will be conversion of former farmlands to residential use by subdividing the land. The Legislature has recently enacted the Growth Management Act to put in place planning goals which encourage development in urban areas, but which reduce the inappropriate conversion of undeveloped land into sprawling, low-density development. RCW 36 70A 020(1) and (2). The non-relinquishment feature of RCW 90 14 140(2)(c) is consistent with this statutory policy by allowing farms to retain irrigation water rights likely to be exercised within a time the Legislature has found reasonable.

XIV

RCW 90 14 140(2)(C) MAY NOT BE MODIFIED BY CONSTRUCTION

Statutes may not be modified by construction, nor should requirements be read into a statute which are not there Hines v. Data Lines Systems, Inc., 114 Wn 2d 127,143 (1990), Kofmehl v. Steelman, 63 Wn App 133,136 (1991), East v. King County, 22 Wn App 247,253 (1978) Earlier this year, in Cocking Farms v. Ecology, PCHB No 93-251 (1994), a majority of the Board, for the first time, read into RCW 90 14 140 (2)(c), a requirement which is not there That requirement was expressed as "objective evidence of a commitment to invest in the future irrigation of the land " Cocking Farms, *supra*, at p 5 That requirement is repeated by the majority today Compounding that, the majority adds another requirement today which is also not there That requirement is expressed as follows " that the period which the user intends to utilize in preparation of the 'determined future development' be commensurate with the time necessary to implement the plan " Majority opinion herein at p 11

XV

What do these requirements mean in this case? In the majority's view they mean

Mr Wirkkala has not met that test For at least 10 years, his father simply did not irrigate or invest any capital in the future irrigation of the land The only purpose of this hiatus in use was to await Mr [Ron] Wirkkala's retirement The proposed investment in the new distribution system has yet to occur, 12 years after the last irrigation of the land
(Majority opinion at p 12)

and this

We further conclude that Mr [Ron] Wirkkala has failed to provide the necessary objective evidence of commitment to the proposed 'determined future development' Absent

any evidence of investment in the new distribution system,
we are left with the conclusion that Mr Wirkkala could at
any time change his plan (Id)

Yet, the Wirkkala plan was not changed And why would Mr Herbert Wirkkala have
irrigated or invested prior to his son's retirement in contravention of the plan? The entire
fifteen years is available under the statute to commit to investment, to invest and to
develop The majority view imposes conditions at the twelve year mark, or sooner, which
improperly divest the Wirkkals of their water right

XVI

Where the Legislature wishes to require conditions, it does so expressly This can
be seen in RCW 90 14 140(2)(e), another sub-section of the same statute That
subsection references water appropriation by the United States for federal reclamation
projects It cites RCW 90 40 030 In Ellensburg Water Company v U S Bureau of
Reclamation, PCHB No 86-153 ,we considered RCW 90 40 030 It provides, in
pertinent part

*Whenever the secretary of the interior of the United States
shall notify the commissioner of public lands of this state
that the United States intends to make examinations or
surveys for the utilization of certain specified waters, the
waters so described shall not thereafter be subject to
appropriation under any law of this state for the period of
one year If the said secretary of the interior shall before
the expiration of said period of one year, certify that the
project contemplated appears to be feasible the waters
specified in such notice shall not be subject to
appropriation for the further period of three years, and
such further time as the commissioner of public lands may
grant (emphasis added)*

1 Thus, conditions to retain a federal reclamation project right have been imposed by the
2 Legislature upon the United States at the one-year and three-year mark. This illustrates
3 the Legislature's familiarity with and ability to impose conditions expressly when it so
4 intends in the context of water right relinquishment. *See, also* RCW 90 14 140(2)(a)
5 relating to a water right for power production (conditioned upon payment of annual
6 license fees), and RCW 90 14 140(2)(b) relating to a reserve water right (conditioned
7 upon the maintenance of facilities in good operating condition)

8 XVII

9 Where the Legislature wishes not to require conditions to retain a water right, it
10 does that also. This can be seen in RCW 90 14 140(2)(d), another sub-section of the
11 statute at issue. That sub-section provides, merely, that there shall be no relinquishment
12

13 *If such right is claimed for municipal water supply*
14 *purposes under chapter 90 03 RCW*

15 Recently, in Okanogan Wilderness League v. Ecology and Town of Twisp, PCHB No
16 93-316 (1994), we granted a directed judgment that the Town's water right was municipal
17 in nature and therefore cannot be relinquished, citing RCW 90 14 140(2)(d)
18 Order Amending Order on Summary Judgment and Granting Directed Judgment, August
19 11, 1994, p 2. This illustrates the Legislature's ability to impose no conditions when it so
20 intends. In that case, neither did we. There was no requirement for a present commitment
21 to invest in a future development, nor limitation of the time for the development to take
22 place, based upon a commensurate time period.
23
24
25
26
27

XVIII

RCW 90 14 140(2)(C) MUST BE READ TO AVOID STRAINED

CONSEQUENCES A statute must be read to avoid absurd or strained consequences
See e g . State v Fjermestad, 114 Wn 2d 828,835 (1990) Citing the dictionary
definition of "development" (*quoted at paragraph VII, supra*) Ecology stresses the
reference there to "subdivision" in the clause following the principal definition Ecology
also argues that each dictionary definition of "development" refers to change, conversion
or alteration (Ecology memorandum at p 9) From this, Ecology urges that to be within
RCW 90 14 140(2)(c), at issue, one must propose a new "future development" different
from the one previously used Finally, Ecology concludes the Wirkkala water right falls
outside the statute because both the previous and future development are for farmland
irrigation of similar crops This is not a correct reading of the statute for several reasons

XIX

First the term "development" in the context of water rights means a completed
appropriation of water on a tract of land for any beneficial use It is not limited to uses
involving subdivision or residential building This is apparent from the policy of the Water
Code, RCW 90 03 005

*State water policy--Cooperation with other agencies--
Reduction of wasteful practices*

*It is the policy of the state to promote the use of the public
waters in a fashion which provides for obtaining maximum
net benefits arising from both diversionary uses of the
state's public waters and the retention of waters within
streams and lakes in sufficient quantity and quality to
protect instream and natural values and rights Consistent
with this policy, the state supports economically feasible
and environmentally sound development of physical
facilities through the concerted efforts of the state with the*

United States, public corporations, Indian tribes, or other public or private entities. Further, based on the tenet of water law which precludes wasteful practices in the exercise of rights to the use of waters, the department of ecology shall reduce these practices to the maximum extent practicable, taking into account sound principles of water management, the benefits and costs of improved water use efficiency, and the most effective use of public and private funds, and, when appropriate, to work to that end in concert with the agencies of the United States and other public and private entities

The term “development” there refers to the physical facilities of private entities, such as family farms. Moreover, the uses deemed beneficial by the state, for private water use, include agriculture and irrigation on the same level as domestic or other development.

RCW 90.54.020(1)

XX

Finally, a careful reading of RCW 90 14 140(2) reveals no suggestion or hint that a "determined future development" must be for a different use than previously carried out on the land involved. Were that so, the Wirkkalas could develop a golf course or grow 30 acres of lawn, but could not replace a prior agricultural irrigation project with another one. There is no legislative policy underlying this view. Were that view correct, a person claiming a right for a "determined future development" under the statute would be required to obtain from Ecology an approval of a change of purpose of use of the water right under RCW 90 03 380 or RCW 90 44 100 prior to exercising the right. The contention that a "determined future development" must be for a different use than previously carried out is the result of a strained interpretation which is without merit.

XXII

1 SUMMARY OF ISSUE ONE The Wirkkalas have complied with the
2 requirements of RCW 90 14 140(2)(c), and the Wirkkala water right is not relinquished
3

4
5 *ISSUE TWO*

6 Whether the requested Temporary/Seasonal Change should be approved?

7 XXIII

8 A WATER RIGHT WHICH IS NOT RELINQUISHED MAY BE
9
10 TRANSFERRED Among the uses a water right holder may make of his property right is
11 to sell, donate or give it to another As stated in *Law of Water Rights and Resources*,
12 *supra*, p 5-83, water rights are generally transferable rights The Wirkkala water right has
13 not been relinquished, and therefore it may be transferred to another

14 XXIV

15 APPLICABLE STATUTE The applicable statutes here are as follows

16 *The right to the use of water which has been applied*
17 *to a beneficial use in the state shall be and remain*
18 *appurtenant to the land or place upon which the same is*
19 *used Provided, however, That said right may be*
20 *transferred to another or to others and become appurtenant*
21 *to any other land or place of use without loss of priority of*
22 *right thereto-fore established if such change can be made*
23 *without detriment or injury to existing rights The point of*
 diversion of water for beneficial use or the purpose of use
 may be changed, if such change can be made without
 detriment or injury to existing rights
 RCW 90 03 380 (emphasis added)

24 and

1 *RCW 90 03 380 shall not be construed to prevent*
2 *water users from making a seasonal or temporary change*
3 *of point of diversion or place of use of water when such*
4 *change can be made without detriment to existing rights*
5 RCW 90 03 390 (emphasis added)

6
7
8 XXV

9 THE UNDISPUTED FACTS The undisputed facts pertinent to issue two,
10 concerning a temporary or seasonal change, are as follows

11 1 On June 20, 1994, appellant Heather Rainey and Herbert Wirkkala filed
12 an application with Ecology for a temporary/seasonal change of the Wirkkala
13 water right to the Rainey farm for the 1994 irrigation season

14 2 The application sought to change the point of diversion about 4 mile up
15 Lincoln Creek

16 3 Lincoln Creek, in the vicinity of the Rainey and Wirkkala farms has no
17 existing water rights, except Wirkkala's, which are embodied in certificates, or
18 permits under the Water Code or claims under the Water Right Claims Act

19 4 Lincoln Creek is a tributary of the Chehalis River Ecology has adopted
20 chapter 173-522 WAC, relating to the Chehalis River, including Lincoln Creek
21 That rule was adopted March 10, 1976 The rule establishes base flows in the
22 Chehalis River The rule does not establish base flows in Lincoln Creek The rule
23 does close Lincoln Creek to further consumptive appropriation

24 5 On August 26, 1994, Heather Rainey filed an application with Ecology
25 for a temporary/seasonal change of point of diversion and point of use identical to
26 the previous application, but for the 1995 irrigation season

XXVI

A RELINQUISHMENT ORDER CANNOT BE THE BASIS FOR DENYING A

TEMPORARY CHANGE BEFORE HEARING

TEMPORARY CHANGE BEFORE HEARING A relinquishment show cause order issued by Ecology, as here, under chapter 90 14 RCW does not cause the relinquishment of a water right. Relinquishment of a water right can only occur following notice and opportunity to be heard, on the relinquishment issue, before this board. See Sheep Mountain, supra, and legislation amending chapter 90 14 RCW thereafter. In this case, Ecology issued a relinquishment show cause order for the Wirkkala water right on July 14, 1994, and, on July 22, 1994 denied the joint Rainey-Wirkkala request for temporary/seasonal change using relinquishment, in part, as a rationale. As there had then been no hearing before this board on the relinquishment issue, denial of the temporary/seasonal change was premature.

XXVII

NO RELINQUISHMENT

NO RELINQUISHMENT As the Wirkkala water right should not have been relinquished as set out above, relinquishment was not a basis to deny the Rainey-Wirkkala request for temporary/seasonal change

XXVIII

NO DETRIMENT OR INJURY TO EXISTING RIGHTS The

temporary/seasonal change requested by appellants, Ratney and Wirkkala, should be granted unless there would be detriment or injury to existing rights. RCW 90.030.380 and -390, *supra*. In this case, there are no existing rights to which the change could be detrimental or injurious. First, no rights exist to divert from the pertinent reach of Lincoln Creek, except for the Wirkkala right requested to be changed. Second, no "minimum

DISSENT
PCHB NO 94-171

flows or levels" of the type recognized in RCW 90 03 345 as appropriations, i e , water rights, exist as to said stream reach RCW 90 03 345

The establishment of reservations of water for agricultural hydroelectric energy, municipal, industrial and other beneficial uses under RCW 90 54 050(1) or minimum flows or levels under RCW 90 22 010 or 90 54 040 shall constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment (emphasis added)

Under both RCW 90 22 010 and RCW 90 54 040, minimum flows or levels may be established only through the adoption of a rule The pertinent rules relating to Lincoln Creek, adopted by Ecology pursuant to RCW 90 22 010 and RCW 90 54 040, are contained in chapter 173-522 WAC That chapter established no minimum flows or levels for Lincoln Creek Thus, no appropriative right was established within the meaning of RCW 90 03 345 See specifically, WAC 173-522-020 Therefore no "minimum flow" water right can be detrimentally impaired by the requested change, because no such right exists

XXIX

The closure of Lincoln Creek by WAC 17-522-050 to "further consumptive appropriation" does not provide a basis for this denial of a temporary/seasonal change of the Wirkkala right which predates the rule The effect of the requested change merely substitutes one farm for another in the utilization of this water right The right was in existence when the closure rule was adopted

XXX

1 Notwithstanding that that no "existing rights" will be detrimentally affected by the
2 requested change, Ecology urges that the change will be "detrimental to the stream"
3 because it would "deprive Lincoln Creek of 20 cfs for the 3 to 4 mile distance" that the
4 Rainey farm lies upstream of the Wirkkala farm Ecology Memorandum at p 19 Nothing
5 in the record supports this statement as fact As a general proposition, changing the flow
6 of a reach of a stream is not *per se* "detrimental to the stream" Additionally, the
7 minimum flows protected by statute are those embodied in "existing rights", brought
8 about by public comment and rule-making, none of which exist as to this reach of Lincoln
9 Creek
10

11
12 XXXI

13 AT TRANSFER, RIGHT BECOMES APPURTENANT TO NEW LAND

14 Ecology has urged in oral argument that even if the temporary/seasonal change were
15 granted, the Wirkkala water right would lapse in Rainey's hands if Wirkkala did not
16 complete the "future development" determined for the Wirkkala farm This is
17 unsupported by the governing statutes, RCW 90 03 380 and - 390 Specifically, RCW
18 90 03 380 provides that
19

20 *Provided, however, That said right may be transferred to*
21 *another or others and become appurtenant to any other*
22 *land or place of use*

23 This then measures the use of the right at the new location to which it becomes
24 appurtenant The cessation of use at the old location after transfer does not affect the
25 right transferred
26

XXXII

1 SUMMARY OF ISSUE TWO Because the Wirkkala water right has not been
2 relinquished, and because the temporary/seasonal change requested jointly by Ramey and
3 Wirkkala can be made without detriment or injury to existing rights, the change should be
4 granted
5

6 CONCLUSION

7 *The Wirkkala water right has not been relinquished Because Cocking Farms v.*
8 *Ecology, PCHB No 93-251 (1994) and this case impose additional conditions for the*
9 *retention of a vested water right, beyond those mandated by statute, both cases should be*
10 *overruled The denial by Ecology of the Ramey-Wirkkala request for temporary/seasonal*
11 *change of water right should be reversed*
12

13 DONE at Lacey, WA, this 2nd day of November, 1994

14 POLLUTION CONTROL HEARINGS BOARD

15 
16 JAMES A TUPPER, JR., Member
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